Mailers Union Local No. 7 affiliated with International Typographical Union (The Kansas City Star Company) *and* Charles Paynter. Case 17-CB-2371

July 13, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On November 25, 1981, Administrative Law Judge Russell L. Stevens issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Mailers Union Local No. 7 affiliated with International Typographical Union, Kansas City, Missouri, its officers, agents, and representatives, shall take the action set forth in the said recommended order.

DECISION

STATEMENT OF THE CASE

RUSSELL L. STEVENS, Administrative Law Judge: This case was heard in Kansas City, Kansas, on August 25, 1981.[1] The charge herein was filed January 13, by Charles Paynter, an individual. The complaint, issued February 10, alleges that Mailers Union Local No. 7 affiliated with International Typographical Union (Respondent or Union) violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

Upon the entire record, and from my observation of the witnessess and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Kansas City Star Company, herein the Employer, is a State of Missouri corporation engaged in production, publication, circulation, and distribution of two daily newspapers, The Kansas City Times and The Kansas City Star; its main office is located at 1729 Grand, Kansas City, Missouri.

During the calendar year ending December 31, 1980, the Employer, in the course and conduct of its business operations, derived gross revenues in excess of $200,000, held membership in or subscribed to various interstate news services, including Associated Press International and New York Times Service, published various syndicated features, including Ann Landers and Erma Bombeck, and advertised nationally sold products, including General Electric and Goodyear products.

The Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Mailers Union Local No. 7 affiliated with International Typographical Union is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*[2]

Respondent is, and has been for many years, the exclusive bargaining representative of certain employees of the Employer, who work as "mailers."[3] Included among the represented employees is Charles Paynter,[4] the Charging Party herein. The last contract between Respondent and the Employer expired by its terms August 15, 1980. That contract contained the following provision, among others:

> All terms and conditions of this Agreement to Extend and Amend the "Master Agreement" shall continue in full force and effect through August 13, 1980, at which time all terms and conditions of this Extension and of the "Master Agreement" shall terminate and cease to be of any force and effect provided that it is agreed that the terms and conditions of employment established by the expiring Agreements shall continue in full force and effect until a new agreement is reached or until an impasse has been reached in negotiations on subject matter of the change or changes in wages, hours and working conditions.

Respondent and the Employer have been negotiating since approximately July 1980 on a successor contract,

[1] All dates hereinafter are within 1981, unless stated to be otherwise.

[2] This background summary is based upon stipulations of counsel, and upon credited testimony and evidence that is not in dispute.

[3] Mailers are employees involved in production of the Employer's newspapers.

[4] Individuals are referred to herein by their last names.

but thus far they have not come to an agreement. An impasse has not been reached. Since August 15, 1980, Respondent and the Employer have continued to adhere to the employment terms and conditions of the expired contract, with the exception of the union-security clause, which has not been enforced since August 15, 1980. Attached to the expired contract was a copy of the general laws of the International Typographical Union and, among other letters of agreement between the parties, an agreement reading as follows:

LETTER OF AGREEMENT

The Union agrees that the following Local Overtime Laws will remain in effect during the life of the contract:

ARTICLE XVII—Law Change:

Section 1. Overtime shall be worked according to priority with the top priority men having a choice of not working or working, on a particular shift. Provided the top men do not refuse all overtime and bears his share of the burden of overtime.

Section 2. The Chairman shall see that all overtime is conspicuously posted. For a period of 30 days after which time it shall be cancelled.

Section 3. For claiming overtime the chairman shall see the following is done in order for the substitute to be eligible to claim overtime.

(a) All of the substitute's overtime is cancelled.

(b) The substitute has made himself available for all "Open" shifts.

(c) The substitute may only claim overtime in his chapel.

(d) The substitute is a member in good standing with the Union.

(e) Journeyman with the most overtime shall be required to give out a day, at the request of the chairman.

(l) No journeyman shall be required to give out more than one day in any one financial week.

THE KANSAS CITY STAR COMPANY — KANSAS CITY MAILERS' UNION NO. 7.

An appreciable amount of overtime work is required of unit mailers, but assignment of overtime to employees is done by the Union.[5] Respondent's foreman decides how many employees he needs for overtime work, and for how long, and he conveys that information to the chapel chairman.[6] The chapel chairman notifies employees of the availability of overtime work, and assigns the overtime in accordance with a priority list[7] prepared and maintained by the Union. The chapel chairman solicits volunteers for overtime by starting at the top of the priority list and working down. If the priority list is exhausted before the required number of overtime employees is obtained, the chapel chairman then starts at the bottom of the list and works up, assigning employees on an involuntary basis to work overtime.

Paynter has been one of the Employer's mailers approximately 27 years. At times relevant herein he worked a 7-hour shift, from 8:15 a.m. to 3:45 p.m. Since approximately October 1980, and continuing to date, Paynter has failed to pay his union dues and in January received a letter from the Union stating that he no longer was a member of the International or of Local No. 7 (Respondent). On January 10, Mac Hathaway, assistant chapel chairman, informed Paynter, who had asked about overtime work that was being solicited for that day, that Paynter could not work because he was delinquent in payment of his dues. Paynter was denied overtime work on January 10, and on that day he observed an employee, with less seniority than he had, staying after workhours to work overtime. On January 17, Paynter asked Tom Taylor,[8] who had solicited employees for overtime work that day, why he was not selected and Taylor replied, "It's a known fact that anybody delinquent in dues is not asked for overtime."[9] On February 20, Bob Andrews, Respondent's chapel chairman,[10] forced Paynter to work overtime and Paynter inquired about it. Andrews said ". . . this was the way it was going to be until it was settled, and I was going to be the last asked and first forced, with no choice at all."[11] Since January 1981, Paynter has been passed over for overtime work on 17 occasions, and has been required involuntarily to work overtime on 13 occasions.[12]

B. *Respondent's Defense*

Andrews testified that any member who is delinquent in payment of dues is passed over when voluntary overtime is offered to mailers, and that any such delinquent member is the first to be forced involuntarily to work overtime. Andrews testified that Paynter has been treated as a delinquent member because of failure to pay dues since January 1981. Andrews testified:

Q. How many persons have you enforced this overtime procedure on in the last two years?

A. I haven't enforced it in the last two years because we haven't had anybody delinquent. Now, the Times, of course, the night chapel, they enforced it because they have quite a few, but for the

[5] This allocation of responsibilities was negotiated by Respondent and the Employer.

[6] There are two union chapels—one for the day crew and one for the night crew (Kansas City Star and Kansas City Times). The chapel chairman is the same as a union steward.

[7] This priority list (G.C. Exh. 2 is the list relevant herein) applies only to mailers' and is different from the seniority list, which is a plantwide list.

[8] Counsel stipulated that Hathaway and Taylor are agents of Respondent.

[9] This quotation is by Paynter. The statement was not contradicted or challenged by Respondent, and is credited.

[10] Andrew's status as an agent of Respondent is not in dispute.

[11] This quotation is from Paynter's testimony, which is credited.

[12] This conclusion is based on Paynter's credited testimony, which was supported by notes he recorded as the incidents occurred.

most part it's the Times chapel and the outside subs that run delinquent.

Q. But on the day shift at the Star, you haven't enforced this overtime procedure with regard to anyone except with Mr. Paynter in the last two years?

A. No ma'am, because I haven't had anybody, to my knowledge, delinquent. The financial secretary presents me with the list telling me who is delinquent and I go by that.

Paynter testified that, when Taylor told him during their conversation of January 17 that it was a "known fact" that delinquent members are not offered overtime work, he protested and replied "that was a fallacy, because I've been asked for the last many months and I've been delinquent two and three months and I've never been failed to be asked." Paynter later testified that he heard prior to January 1981 that the Union passed over dues delinquent members who wanted to work overtime, but that he did not know of any such instance, and it never had happened to him.

Richard Miller, the Employer's labor relations manager for the past 4-1/2 years and an employee of the Employer for 31 years, testified that he never has been aware of a union policy of passing over dues delinquent members who desired overtime work. Miller stated that the Union is responsible for assigning overtime work to employees pursuant to the priority list, but that the Employer has taken the position in present negotiations with Respondent that it (the Employer) wants to assign overtime and has made a proposal to that effect. Miller testified that he knows of no instance (other than the one in issue) wherein Respondent has refused overtime to Paynter, or has forced him to work overtime.

Discussion

Some testimony of this issue is ambiguous and inconclusive. Clearly, Paynter has not been denied overtime, or forced to work overtime, prior to January 1981 because of dues delinquency. Andrews stated that other employees have been denied, or forced to work, overtime in the past but he gave no specific testimony and, further, stated that most such instances occur on the night shift (Kansas City Times). Miller is a longtime employee of the Kansas City Star. Although the Union assigns overtime, it seems highly unlikely that, if an incident of overtime denial or forcing had occurred in the past, Miller would not have heard of it. If the Union had such policy as contended by Andrews, that policy was not shown by Respondent. Possibly, Andrews was referring to substitutes (discussed *infra*), as opposed to regular full-time employees such as Paynter, when he refered to dues delinquent members and a policy of the Union relating to them, but if so, no such distinction was made.

It is found that neither Paynter nor any other regular, full-time employee of the Employer has been denied, or forced to work, overtime prior to January 1981 because of the employees being delinquent in payment of dues to Respondent.

1. Collective-bargaining agreement

Respondent argues that the collective-bargaining agreement still is in force and effect, as shown by (a) the wording of the contract clause quoted *supra*; (b) continued utilization by the parties of the arbitration provisions of the contract.

Neither of Respondent's arguments has merit. So far as the wording of the contract is concerned, it is quite plain that the contract has expired by its own terms. Respondent relies upon the extension provision to support its argument, but that provision relates to "the terms and conditions of employment established by the expiring agreement," not to "All terms and conditions of this agreement." The agreement is not extended; terms and conditions of employment established by the expired agreements are extended. Those two references are explicit and clear, and leave no room for the contention of Respondent. If the parties had intended automatically to extend the agreements (including the International agreement and the various letters of agreement attached to and made a part of the bargaining contract), they would have said so, without any distinction having been made between the agreements and the terms and conditions of employment.

So far as the arbitration matters are concerned, utilization by the parties of the terms and conditions of the arbitration provisions of the contract does not breathe life into an otherwise dead agreement. The extension provision of the expired contract includes extension of the right to insure continuation of terms and conditions of employment, as envisioned by the old contract, pending new meeting of minds and negotiation of a new agreement.

Finally, the fact that the union-security provisions of the expired contract no longer are enforced is recognition by the parties of the fact that they have no agreement; rather, they have only terms and conditions of employment that continue both because the parties said so, and because of the law, which says the same thing.

It is found that, because the contract between the parties expired by its terms on August 15, 1980, and because that contract has not been superseded by a new agreement, there is no collective-bargaining agreement between Respondent and the Employer at the present time.

2. The letter of agreement

This letter, discussed *supra*, was made apart of the expired agreement, and has not been incorporated in a new agreement. Hence, the letter presently does not bind the Union and the Employer. Moreover, Miller credibly testified that the Employer opposes the Union's exclusive assignment of overtime to employees, and that the Employer now has a proposal "on the table" relative to overtime assignments, of which the letter of agreement is a part.

In any event, the letter of agreement does not affect any issue herein, since it covers only substitute employees. Paynter is not a substitute; he is a regular full-time employee.

3. Paynter's loss of, and being forced to work, overtime

As discussed above, Paynter was denied overtime work, and forced to work overtime, solely because he was delinquent in payment of dues to Respondent.

It is well settled that a union lawfully cannot cause or attempt to cause an employee to be denied employment or to be discharged because of the employee's failure to pay a union assessment other than periodic dues of initiation fees uniformally required as a condition of acquiring or retaining union membership.[13]

The question here, is whether or not the Union could do something less than destroy the employment relationship between the Employer and Paynter; i.e., whether or not the Union could deprive Paynter of overtime work and force him to work overtime, while not demanding of the Employer that it discharge Paynter as it had a right to do under the Act. This question, too, long since has been settled by the Board. In *Pittsburgh Press Company*[14] the Board stated:

> In *Krambo Food Stores, Incorporated*, 106 NLRB 870, 879 (1953), the Board declared:
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> > A reading of the second proviso [to Sec. 8(a)(3)] clearly shows that it was designed further to limit, and not to expand, the narrow discrimination allowed. Accordingly, we believe that by the use of the words "any discrimination" the Congress in 1947 did not intend to enlarge the area of permissible discrimination under the existing law but, on the contrary, sought to further circumscribe the allowable area of discrimination.
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> Thus, the Board held that the Act did not "give employers and unions a license to use various discriminatory devices, *short of discharge*, to coerce an employee to join the union while still holding over his head the alternate threat of discharge which the statute sanctions." (Emphasis supplied.) In *Kisco Company, Inc.*, our dissenting colleague joined in adopting the following statement of an Administrative Law Judge: "It is axiomatic at this point that an employer may not use something less than discharge in enforcing the requirements of a valid union-security clause. We see no reason for departing from carefully reasoned precedent concerning this issue.
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> Accordingly, we adopted the Administrative Law Judge's findings of the violations herein.

Assuming *arguendo* that the bargaining agreement between the parties still was in effect, possibly Respondent could have requested that the Employer discharge Paynter, but the contract was not in effect. Whether or not it was in effect is immaterial, since in neither event could Respondent punish Paynter by causing, or attempting to cause, action designed to result in something less than discharge.

Respondent did not argue this issue in its brief.

It is found that Respondent's action against Paynter violated the Act as alleged.

4. The 8(b)(2) issue

Respondent moved at hearing to dismiss this allegation, and Respondent's brief is limited almost entirely to arguing that the allegation should be dismissed on the ground that, as Justice Black stated in his dissent in *The Radio Officers' Union*,[15] "A union does not [discriminate] . . . unless that employer discrimination is 'in violatlon of [Section] 8(a)(3).'" Respondent contends that "a violation of Section 8(b)(2) can only be found after a violation by the Employer of Section 8(a)(3)," and that the General Counsel neither alleged nor proved an 8(a)(3) violation, nor did the General Counsel establish a *prima facie* violation of Section 8(b)(2).

It is noted, initially, that *The Radio Officers' Union* majority opinion still is the law. That opinion is explicit and clear, stating in part:[16]

> Petitioner in *Radio Officers* contends that it was fatal error for the Board to proceed against it, a union, without joining the employer, and that absent a finding of violation of [Section] 8(a)(3) by and a reinstatement order against such employer, the Board could not order the union to pay backpay under [Section] 8(b)(2).
>
> We find no support for these arguments in the Act. No such limitation is contained in the language of [Section] 8(b)(2). That section makes it clear that there are circumstances under which charges against a union for violating the section must be brought without joining a charge against the employer under [Section] 8(a)(3) for attempts to cause employers to discriminate are proscribed. Thus, a literal reading of the section requires only a showing that the union caused or attempted to cause the employer to engage in conduct which, if committed, would violate [Section] 8(a)(3). No charge was filed against the company by Fowler when he filed his charge against the union. The General Counsel is entrusted with "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints," but without a charge he has no authority to issue a complaint. Even when a charge is filed many factors must influence exercise by the General Counsel of this discretion relative to prosecution of unfair labor practices. Abuse of discretion has not been shown, and, when a complaint is prosecuted, the Board is empowered by [Section] 10(a) "to prevent any person from engaging in any unfair labor practice. . . ." It, therefore, had the power to find that the union had violated [Section] 8(b)(2).

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[13] *N.L.R.B.* v. *The Radio Officers' Union of the Commercial Telegraphers Union, AFL [A. H. Bull Steamship Company]*, 347 U.S. 17 (1954).

[14] 241 NLRB 666, at 667 (1979). See also *The Radio Officers' Union, supra; Association of Western Pulp & Paper Workers, Local 78 (Fibreboard Paper Products Corp.)*, 170 NLRB 49 (1968); *Kisco Company, Inc.*, 192 NLRB 899 (1971).

[15] *Supra* at 61.

[16] *Supra* at 53-54.

Nor does the absence of joinder of the employer preclude entry of a back-pay order against the union.

So far as the 8(b)(2) allegation is concerned, Respondent relies, as support for its contention, upon Miller's testimony that he was not aware of any attempt by the Union to cause the Employer to affect Paynter's overtime. There is no dispute about the fact that the Employer was not immediately and directly involved in discrimination against Paynter. However, that fact is immaterial to resolution of this issue. Pursuant to agreement between Respondent and the Employer, Respondent had exclusive control over allocation of overtime work. Respondent exercised that control in a discriminatory manner. Respondent's discriminatory actions resulted in the Employer paying Paynter less than Paynter should have received, and in assigning Paynter overtime work that Paynter was entitled to refuse. Clearly, the Employer was prevailed upon by Respondent to discriminate against Paynter, whether or not Miller personally knew of that discrimination. It may well be, as argued by Respondent, that the Employer has not been alleged to have violated Section 8(a)(3) of the Act, but as shown *supra*, that fact also is immaterial. Respondent violated Section 8(b)(2) of the Act, as alleged.[17]

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICE UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent engaged in activities violative of Section 8(b)(1)(A) and (2) of the Act, I shall recommend that they be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

Since Respondent's method of assigning overtime work to Paynter was discriminatory, and resulted in Paynter losing overtime pay to which he was entitled, I shall recommend that Respondent Union be ordered to make Paynter whole for the loss of earnings he suffered as a result of the discrimination against him, in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

Upon the basis of the foregoing findings of fact and upon the entire record, I hereby make the following:

[17] *Miranda Fuel Company, Inc.*, 140 NLRB 181 (1962), enforcement denied 326 F.2d 172 (2d Cir. 1963). See also *Olympic Steamship Co., Inc. d/b/a Salmon Terminal Division*, 233 NLRB 1178 (1977).

CONCLUSIONS OF LAW

1. The Kansas City Star Company is, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Mailers Union Local No. 7 affiliated with International Typographical Union is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(b)(1)(A) and (2) of the Act by refusing to assign overtime work to, and forcing overtime work by, Charles Paynter, in a discriminatory manner.
4. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the basis of the foregoing findings of fact, conclusions of law, and upon the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended.

ORDER[18]

The Respondent, Mailers Union Local No. 7 affiliated with International Typographical Union, Kansas City, Missouri, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Violating Section 8(b)(1)(A) and (2) of the Act by refusing to assign overtime work to, and forcing overtime work by, Charles Paynter in a discriminatory manner.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action, which is necessary to effectuate the policies of the Act:

(a) Make whole Charles Paynter for any and all loss of earnings suffered by him as a result of the discrimination against him, in the manner set forth in the section of this decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to compute the amount of backpay due under the terms of this Order.

(c) Post at its meeting hall copies of the attached notice marked "Appendix."[19] Copies of said notice, on forms provided by the Regional Director for Region 17, after being duly signed by its authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places

[18] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[19] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Sign and mail sufficient copies of said notices to the Regional Director for Region 17, for posting by The Kansas City Star Company at all locations where notices to employees are customarily posted, if said Employer is willing to do so.

(e) Notify the Regional Director for Region 17, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT violate Section 8(b)(1)(A) and (2) of the Act by refusing to assign overtime work to, and forcing overtime work by, Charles Paynter in a discriminatory manner.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

WE WILL make whole Charles Paynter for any and all loss of earnings suffered by him as a result of the discrimination against him, with interest.

MAILERS UNION LOCAL NO. 7 AFFILIATED WITH INTERNATIONAL TYPOGRAPHICAL UNION